

1 J. PAUL PALMISANO, Esq.  
2 **ACACIA LAW GROUP**  
3 1839 S. Alma School Rd.  
4 Mesa, Arizona 85210  
5 Tel: 480.557.7800  
6 Fax: 480.966.2568  
7 AZ Bar No.: 012839  
8 Email: [jpaul.alg@gmail.com](mailto:jpaul.alg@gmail.com)

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

David Otto Schwake,  
Plaintiff,

vs.

Arizona Board of Regents; Arizona  
State University; Arizona State  
University School of Life Sciences;  
Michael M. Crow; Kevin Cook;  
Noreen Sablan; Ron Hicks; and  
Gregory Castle,  
Defendants.

Case No. CV-15-00696

PLAINTIFF'S RESPONSE TO  
DEFENDANTS' MOTION TO  
DISMISS

The Defendants filed a Motion to Dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure claiming Plaintiff's Complaint fails to state a claim. Their motion should be denied because Plaintiff has set forth sufficient facts in his Complaint to support the elements of his claims and the procedural bars alleged by Defendants are without merit.

**I. STANDARD FOR RULE 12(b)(6) DISMISSAL**

The Defendants seek dismissal of the Plaintiff's claims under Rule 12(b)(6) of the Federal Rules of Civil Procedure, asserting that the Plaintiff failed to state claims on which relief may be granted. In deciding a Rule 12(b)(6) motion, the "central issue" is whether the complaint, viewed in a light favorable to the plaintiff, states a claim for relief. Fed. R. Civ. P. 12(b)(6). It cannot be used to resolve factual issues or the merits of the case. *Republican Party v. Martin*, 980 F.2d 943, 952 (4th Cir. 1992).

1 In order to survive a Rule 12(b)(6) motion, a plaintiff need only plead a short and  
2 plain statement of facts showing entitlement to relief, *Porter v. Jones*, 319 F.3d 483, 494 (9th  
3 Cir. 2003), setting out “enough facts to state a claim to relief that is plausible on its face.”  
4 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955 (2007). The Supreme Court  
5 elaborated on the dismissal standard, stating “[a] claim has facial plausibility when the  
6 plaintiff pleads factual content that allows the court to draw the reasonable inference that the  
7 defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct.  
8 1937, 1949 (2009). Dismissal is only appropriate if the plaintiff has not “allege[d] enough  
9 facts to state a claim to relief that is plausible on its face.” *Turner v. City of S.F.*, 788 F.3d  
10 1206, 1210 (9th Cir. 2015) (quoting *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 588 (9th  
11 Cir. 2008)). This means “a complaint does not need detailed factual allegations, but must  
12 provide the plaintiff’s grounds for entitlement to relief—including factual allegations that  
13 when assumed to be true raise a right to relief above the speculative level.” *Cuvillier v.*  
14 *Taylor*, 503 F.3d 397, 401 (5th Cir. 2007) (internal quotations omitted).

15 The Court must assume that all material facts contained in the complaint are true,  
16 *Davis v. Monroe*, 526 U.S. 629, 633, 119 S. Ct. 1661 (1999), and construe them in light most  
17 favorable to the nonmoving party. *Skilstaf, Inc. v. CVS Caremark Corp.*, 669 F.3d 1005,  
18 1014 (9th Cir. 2012). A district court should grant leave to amend unless it determines that  
19 the pleading could not possibly be cured by the allegation of other facts. *Doe v. United*  
20 *States*, 58 F.3d 494, 497 (9th Cir. 1995). Motions to dismiss are disfavored by the federal  
21 courts, *Rennie & Laughlin, Inc. v. Chrysler Corp.*, 242 F.2d 208, 213 (9th Cir. 1957), even  
22 post-*Iqbal*, see, e.g., *Turner v. Pleasant*, 663 F.3d 770, 775 (5th Cir. 2011), because the  
23 primary objective of the law is to obtain a determination of the merits of a claim and there  
24 are other more effective pretrial procedures to implement for the expeditious handling of  
25 legal controversies. *Rennie & Laughlin, Inc.*, 242 F.2d at 213.

26 ////

1 **II. OBJECTION TO CONSIDERATION OF EXTRINSIC MATERIALS**  
2 **UNDER RULE 12(B)(6) STANDARD**

3 As an initial matter, Plaintiff objects to the Court's consideration of materials outside  
4 the pleadings in this case in this Rule 12(b)(6) proceeding. As a general rule, a district court  
5 may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion. *Lee*  
6 *v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001). Factual argument is inappropriate  
7 in a Rule 12(b)(6) motion, which tests only the legal sufficiency of the complaint. Thus,  
8 when matters outside the pleadings are introduced on a Rule 12(b)(6) and the matters are not  
9 excluded by the district court, the motion is to be treated as one for summary judgment and  
10 disposed of as provided in Rule 56 of the Federal Rules of Civil Procedure with proper notice  
11 of the conversion to the nonmoving party. Fed. R. Civ. P. 12(b)(6); *Hamilton Materials, Inc.*  
12 *v. Dow Chemical Corp.*, 494 F.3d 1203, 1207 (9th Cir. 2007).

13 Under two exceptions to this requirement, a district court may consider extrinsic  
14 evidence in a Rule 12(b)(6) motion when: (1) the materials which are properly submitted as  
15 part of the complaint and (2) the matters are of public record suitable for judicial notice. *Lee*,  
16 250 F.3d at 688. Neither exception applies here. Defendants attached four exhibits to their  
17 Motion to Dismiss: (1) Notice Letter dated August 14, 2014; (2) ABOR Student Disciplinary  
18 Procedures; (3) Notice Letter dated November 3, 2014; and (4) Notice of Claim and  
19 Amended Notice of Claim. Plaintiff does not rely on any of these materials in his Complaint  
20 nor are any of the materials attached to his Complaint as the basis of this claims. Further,  
21 none of the materials are matters of public record suitable for judicial notice. Accordingly,  
22 Plaintiff objects to the consideration of these materials as part of Defendant's Motion to  
23 Dismiss under Rule 12(b)(6).

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1 **III. PLAINTIFF HAS SUFFICIENTLY PLEAD HIS FEDERAL CLAIMS**  
2 **UNDER RULE 12(b)(6)**

3 With regard to the merits of Defendants' Motion to Dismiss, Defendants' first  
4 argument is for dismissal of Plaintiff's Section 1983 claims based on qualified immunity.  
5 Motion, pg. 4.

6 **A. Defendants Are Not Entitled to Dismissal Of Plaintiff's § 1983**  
7 **Claims Based On Qualified Immunity**

8 A defendant in a Section 1983 action may assert qualified immunity as a defense if  
9 his or her conduct does not violate clearly established statutory or constitutional rights of  
10 which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102  
11 S. Ct. 2727 (1982). In *Saucier v. Katz*, the Supreme Court set forth a two step process for  
12 resolving a qualified immunity claim: the first step being a "constitutional inquiry" and the  
13 second step is a "qualified immunity" inquiry. *Saucier*, 533 U.S. 194, 201, 121 S. Ct. 2151  
14 (2001).<sup>1</sup> The "constitutional inquiry" asks whether, when taken in the light most favorable  
15 to the non-moving party, the facts alleged show that the official's conduct violated a  
16 constitutional right. *Id.* If so, a court would turn to the "qualified immunity inquiry" and ask  
17 if the right was clearly established at the relevant time. *Id.* at 201202. The relevant inquiry  
18 in determining whether the right violated was clearly established is whether it would be clear  
19 to a reasonable official that his conduct was unlawful in the situation presented. *Id.* at 202.  
20 A right is clearly established if its contours are sufficiently clear that a reasonable official  
21 would understand that what he is doing violates that right. *Kennedy v. City of Ridgefield*, 439  
22 F.3d 1055, 1065 (9th Cir. 2005). The second inquiry must be taken in light of the specific  
23 context of the case, not as a broad general proposition. *Id.*

24 At the motion to dismiss stage, the court must take allegations of complaint as true in  
25 determining qualified immunity. *Grant v. City of Long Beach*, 315 F.3d 1081, 1088-89 (9th

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26 <sup>1</sup>Since *Saucier*, the Supreme Court has held the two step process does not have to  
27 proceed in any particular order. *Pearson v. Callahan*, 555 U.S. 223, 236, 129 S. Ct. 808  
28 (2009).

1 Cir. 2002). Thus, granting dismissal on the basis of Rule 12(b)(6) is only appropriate if the  
2 court can determine from the face of the complaint that qualified immunity applies. *Groten*  
3 *v. California*, 251 F.3d 844, 851 (9th Cir. 2001); *Morley v. Walker*, 175 F.3d 756, 761 (9th  
4 Cir. 1999) (because allegations in complaint must be taken as true on a motion to dismiss  
5 dismissal based on qualified immunity is inappropriate). As shown below, the face of the  
6 Complaint does not support the application of qualified immunity to any of Plaintiff's claims.

7  
8 **1. Defendants Violated Plaintiff's Constitutional Right**  
9 **to Procedural Due Process that Was Clearly**  
10 **Established**

11 In the Complaint, the Plaintiff asserts his procedural due process rights were violated  
12 when Defendants Norean Sablan ("Sablan") and Ron Hicks ("Hicks") banned him from the  
13 lab, suspended him, and when Defendant Hicks changed his sanction of suspension to  
14 campus access restriction, cancelled his hearing, and informed Plaintiff the decision was  
15 final. Compl. ¶¶ 113-114. A procedural due process claim has two elements: deprivation  
16 of a constitutionally protected liberty or property interest and denial of adequate procedural  
17 protection. *Brewster v. Bd. of Educ. of Lynwood Unified Sch. Dist.*, 149 F.3d 971, 982 (9th  
18 Cir. 1998). Plaintiff had a recognized property and liberty interest in his education and  
19 continued studies at the university as well as his PhD research on *Legionella* bacteria in water  
20 distribution systems. Compl. ¶¶ 12-13. Where a person's good name, reputation, honor or  
21 integrity is at stake because of what the government is doing to him, minimal requirements  
22 of the Due Process Clause must be satisfied. *Goss v. Lopez*, 419 U.S. 565, 574, 95 S. Ct. 729  
23 (1975) (citing *Wisconsin v. Constantineau*, 400 U.S.433, 437, 91 S. Ct. 507 (1971)). A  
24 suspension for even ten days can seriously damage a student's standing with fellow pupils  
25 as well as interfere with later opportunities including employment. *Id.* A student facing  
26 expulsion or suspension from a public university is entitled to the protections of due process.  
27 *Gomes v. Univ. of Me. Sys.*, 365 F. Supp. 2d 6, 14 (D. Me. 2005) ("The First Circuit has held

1 that a student's interest 'in pursuing an education is included within the fourteenth  
2 amendment's protection of liberty and property.'").

3 On August 14, 2014, Plaintiff was issued a no-contact directive by Defendant Sablan  
4 directing him not to be in any location that fellow PhD candidate Lauren McBurnett  
5 ("McBurnett") was based on the alleged complaints she made against him. Compl. ¶¶ 29-31.  
6 He was told he should even avoid conferences and seminars she might also attend. Compl.  
7 ¶ 32. On September 5, 2014, Plaintiff was suspended for the Fall 2017 semester effective  
8 immediately. Compl. ¶ 42. Plaintiff was suspended until December 3, 2014 when he was  
9 told verbally his suspension was changed to a three year restricted access to the campus, from  
10 course work and from employment. Compl. ¶ 92. Thus, Plaintiff was suspended for four  
11 months and his access to the lab where his research was being conducted was severely  
12 limited at best and then completely barred during the same time period. Compl. ¶ 42.  
13 Plaintiff clearly had a property and liberty interest in his education at ASU and his post-  
14 graduate research as part of his education.

15 Defendants rely on *Souders v. Lucero*, 196 F.3d 1040 (9th Cir. 1999) to support their  
16 claim that Plaintiff did not have a constitutionally protected interest in unrestricted access to  
17 the campus. But *Souders* can be easily distinguished because it involved two Temporary  
18 Protective Stalking Order obtained against an alumnus legitimizing his exclusion from using  
19 the campus library and attending open campus events. *Id.* at 1041. The plaintiff's argument  
20 for a constitutionally protected interest hinged on whether the university campus was a public  
21 forum which he had a right to occasionally visit. *Id.* at 1043. Here, Plaintiff was a student  
22 when the access was suspended and the suspension carried over post-graduation to interfere  
23 with his research and life's work, which started long before McBurnett made any allegations  
24 against him. Therefore, *Souders* does not apply to this case.

25 As for the second prong of a due process claim, Defendants owed Plaintiff due  
26 process before they banned, suspended and then suspended him post-graduation from  
27 working on campus. A student is entitled to at least the following bare minimum due process  
28

1 requirements in an academic setting: (1) the student must be advised of the charges against  
2 him; (2) he must be informed of the nature of the evidence against him; (3) he must be given  
3 an opportunity to be heard in his own defense; and (4) he must not be punished except on the  
4 basis of substantial evidence. *Keene v. Rodgers*, 316 F. Supp. 217, 221 (D. Me. 1970).

5 Although Defendants claim that Plaintiff does not allege he was denied  
6 constitutionally adequate procedures, this is completely false. Plaintiff received a letter on  
7 August 14, 2014 stating there were multiple instances of misconduct alleged and now  
8 pending against him and he was immediately issued a no contact directive. Compl. ¶¶ 29-31.  
9 He then had to attend a meeting the very next day with Defendant Sablan. Complaint, ¶33.  
10 He then was given a summary overview of the allegations made by McBurnett. Compl. ¶ 34.  
11 He asked to see the alleged complaint, but it was never provided to him. Compl. ¶¶ 34-35.  
12 On August 22, 2014 he was then summoned to another meeting in Defendant Sablan's office  
13 where he told Sablan the relationship with McBurnett was on and off again but always  
14 consensual. Compl. ¶¶ 39-40. Further, there were several inaccuracies in McBurnett's  
15 allegations. Compl. ¶ 41. On September 5, 2014 Plaintiff received a letter stating he was  
16 found responsible for three violations and was suspended effective immediately. Compl. ¶  
17 42. The decision was final unless he requested a hearing. Compl. ¶ 43. If requested, he  
18 could have a hearing and be able to have counsel present, cross examine witnesses, and  
19 present witnesses. Compl. ¶¶ 44-45.

20 The suspension continued for four months and before the requested hearing could  
21 occur, Defendant Hicks told Plaintiff his sanction was changed to essentially a three year  
22 suspension from access to the lab and from all post doctoral work, paid or volunteer, at ASU.

23 Compl. ¶ 96. Based on the foregoing, Plaintiff was not properly informed of the nature of  
24 the evidence against him, he was not given an opportunity to develop his defense and present  
25 it to ASU, there was no hearing to be recorded or for cross-examination or presentation of  
26 witnesses despite what was promised, and there was no opportunity to appeal. Plaintiff was  
27 never given a meaningful opportunity to be heard or to confront those who asserted serious  
28

1 allegations against him. Plaintiff also asserts that Defendant Gregory Castle (“Castle”)  
2 violated his procedural due process rights by communicating directly with Plaintiff despite  
3 knowing Plaintiff was represented by counsel. Compl. ¶ 116.

4 Plaintiff’s procedural due process right was also clearly established at the relevant  
5 time as to defeat the application of qualified immunity. Defendants Sablan and Hicks  
6 understood the ramifications of suspending and expelling a student without sufficient due  
7 process. The United States Supreme Court decided *Goss* in 1975. They initially promised  
8 Plaintiff a hearing and opportunity to be heard knowing it was required for a suspension. But  
9 when it appeared the suspension would not prevent Plaintiff’s graduation, they changed their  
10 suspension to a limitation of access for three years and decided a hearing was no longer  
11 required because Plaintiff would graduate anyway. Compl. ¶¶ 92-95. They found a way to  
12 interfere with his research and work for his entire last semester at ASU and then prevent him  
13 from continuing and building on the work he loved for three years after his graduation  
14 without a hearing in front of an objective tribunal. Therefore, Defendants are not entitled to  
15 dismissal of Plaintiff’s procedural due process claims based on qualified immunity.

## 16 17 18 **2. Defendants Violated Plaintiff’s Right to Substantive Due Process that Was Clearly Established**

19 Next, Defendants request dismissal of Plaintiff’s substantive due process claims based  
20 on qualified immunity. Interestingly, the Defendants claim Plaintiff’s substantive due  
21 process claim should be dismissed because the Due Process Clause provides procedural  
22 protections that cover school discipline. Mot. 7. Thus, Defendants all but admit that Plaintiff  
23 has a procedural due process claim. However, Plaintiff also has a substantive due process  
24 claim because the two are not mutually exclusive. The “touchstone of due process is  
25 protection of the individual from arbitrary governmental action.” *County of Sacramento v.*  
26 *Lewis*, 523 U.S. 833, 845, 118 S. Ct. 1708 (1998) (internal quotations omitted).



1 To establish a substantive due process claim under Section 1983, a plaintiff must  
2 show: (1) the particular interest at issue is protected by the Fourteenth Amendment; and (2)  
3 the government's deprivation of that protected interest shocks the conscience. *Nunez v. City*  
4 *of Los Angeles*, 147 F.3d 867, 871 (9th Cir. 1998) (stating that substantive due process  
5 "forbids the government from depriving a person of life, liberty, or property in such a way  
6 that 'shocks the conscience' or 'interferes with rights implicit in the concept of ordered  
7 liberty'"). The Defendants' pattern over four months of denying Plaintiff access to his  
8 research and work constitutes actions that shock the conscience. Compl. ¶¶12-42. Plaintiff  
9 has plead sufficient facts to support he had a protected liberty and property interest in his  
10 education and research and that Defendants Sablan, Hicks and Castle's actions over the four  
11 months of denying Plaintiff the ability to conduct and complete his life's work shocks the  
12 conscience. Accordingly, his substantive due process claim should not be dismissed.

13  
14  
15 **3. Defendants Violated Plaintiff's Constitutional Right  
to Privacy that Was Clearly Established**

16 The Defendants also claim that Plaintiff's constitutional right to privacy claim should  
17 be dismissed as a matter of law despite admitting that the existence of a right to privacy is  
18 debatable. Mot. 8. It is inappropriate to dismiss Plaintiff's right to privacy claim on a Rule  
19 12(b)(6) motion because the right *may* be debatable. There is a constitutional "individual  
20 interest in avoiding disclosure of personal matters" by the government. *Whalen v. Roe*, 429  
21 U.S. 589, 599, 97 S. Ct. 869 (1977). The interest has been defined by the Fifth Circuit as  
22 "the right to be free from the government disclosing private facts about its citizens." *Ramie*  
23 *v. City of Hedwig Village, Tex.*, 765 F.2d 490, 492 (5th Cir. 1985). Further, as Defendants  
24 admit, the Ninth Circuit has found the Constitution protects an individual's interest in  
25 avoiding disclosure of personal information. *NASA v. Nelson*, 530 F.3d 865, 877 (9th Cir.  
26 2008). Although the case was reversed by the Supreme Court, the recognition of the right  
27 to privacy was not overturned. *NASA v. Nelson*, 562 U.S. 134, 131 S. Ct. 736 (2011).

1 Here, Plaintiff alleges facts to support his right to privacy was violated. The details  
2 of the allegations made against Plaintiff and the disciplinary steps taken against him were  
3 disclosed by those involved to Defendant Thomas Seager (“Seager”). Compl. ¶ 58.  
4 Defendant Seager then not only openly discussed Plaintiff’s case with others but used  
5 Plaintiff’s case as a prompt for discussion in his classes going as far as using Plaintiff’s name  
6 and accusing him of being convicted of sexual assault. Compl. ¶¶ 46-58. Any interest in  
7 maintaining a safe educational environment is not furthered by open discussions of Plaintiff’s  
8 case and using the Plaintiff and his private ordeal as a discussion point. Another faculty  
9 member, Dr. Amy Landis, filed a formal complaint regarding Defendant Seager’s disclosure  
10 of information, Compl. ¶¶ 50-52, and students in Defendant Seager’s classes complained of  
11 his misuse and disclosure of Plaintiff’s private information. Compl. ¶ 56. Further, it would  
12 be clear to a reasonable school official such as Defendants Sablan, Hicks and Seager that  
13 their conduct was unlawful in disclosing Plaintiff’s private information to other staff and  
14 students in the situation presented.

15 Defendants cite to *Wyatt v. Fletcher*, 718 F.3d 496 (5th Cir. 2013) for support that  
16 school official’s discussion of private matters does not violate a right to privacy. Motion, pg.  
17 10. However, *Wyatt* is clearly distinguishable in that the case involved a coach speaking to  
18 a parent about the student’s sexual orientation. The Fifth Circuit noted that it had “never  
19 suggested that a privacy interest precludes school authorities from discussing with parents  
20 matters that relate to the interests of their children.” *Wyatt*, 718 F.3d at 505. *Wyatt* obviously  
21 does not fit the facts of this case. Accordingly, Defendants are not entitled to dismissal of  
22 Plaintiff’s constitutional right to privacy claim.

23  
24 **B. Defendants Are Not Entitled to Dismissal of Plaintiff’s Title IX  
Claim**

25 Moving on, Defendants next argue that Plaintiff’s Title IX claim should be dismissed  
26 because Plaintiff does not allege facts that plausibly suggest he is entitled to relief. Mot. 11.  
27 Section 901(a) of Title IX provides:

1 No person in the United States shall, on the basis of sex, be excluded from  
2 participation in, be denied the benefits of, or be subjected to discrimination  
under any education program or activity receiving Federal financial assistance.

3 20 U.S.C. § 1681(a). Title IX is enforceable through an implied right of action. *Cannon v.*  
4 *Univ. of Chicago*, 441 U.S. 677, 716, 99 S. Ct. 1946 (1979). Plaintiff asserts a Title IX claim  
5 under the theory of “erroneous outcome.”

6 In an “erroneous outcome” case, the plaintiff challenges the university disciplinary  
7 proceeding on grounds of gender bias by arguing the plaintiff was innocent and wrongly  
8 found to have committed the offense. *Yusuf v. Vassar Coll.*, 35 F.3d 709, 715 (2d Cir. 1994).  
9 Here, Plaintiff asserts sufficient facts to plausibly suggest he is entitled to relief. Defendant  
10 ASU, through the acts of its officials, wrongfully found Plaintiff to have committed the  
11 offenses alleged by McBurnett. Compl. ¶¶124-126. Plaintiff alleges the decision was gender  
12 based because he was discouraged from filing a complaint against his female accuser, his  
13 confidentiality of the student disciplinary process was compromised, and other male students  
14 had been discriminated against by ASU because the male is invariably found guilty in sexual  
15 harassment proceedings at ASU. Compl. ¶¶ 124-131. Thus, it is plausible based on the facts  
16 pled that ASU violated Title IX.

17  
18 **IV. DEFENDANTS ARE NOT ENTITLED TO DISMISSAL TO**  
19 **PLAINTIFF’S STATE CLAIMS AGAINST THE INDIVIDUAL**  
**DEFENDANTS**

20 Lastly, Defendants argue Plaintiff’s state law claims against Defendant ASU and the  
21 Individual Defendants should be dismissed. Mot. 12. Plaintiff is not pursuing state law  
22 claims against the ASU Board of Regents as ASU is protected by Eleventh Amendment  
23 immunity. However, Plaintiff is still pursuing his claims against the Individual Defendants.

24 Defendants allege Plaintiff’s state law claims against the Individual Defendants  
25 should be dismissed because Plaintiff’s alleged Notice of Claim which Defendant attached  
26 to the Motion failed to provide notice of claim as required by a Arizona state statute as to  
27 Defendants Sablan, Hicks and Seager. Mot. 13. Plaintiff objects to the use and consideration  
28

1 of the Defendants' exhibit in this Rule 12(b)(6) failure to state a claim proceeding because  
2 it is extrinsic evidence and should only be considered as part of a Rule 56 summary judgment  
3 proceeding. In order to rebut the Defendants allegations, Plaintiff would be required to  
4 produce evidence outside the pleadings which is inappropriate under Rule 12(b)(6). If the  
5 Court decides to consider the Defendants' evidence, then Plaintiff asks this proceeding be  
6 converted to a summary judgment proceeding and Plaintiff provided sufficient notice to  
7 prepare a response under a Rule 56 standard.

8 Alternatively, if the Court considers the evidence, then Plaintiff's argue that service  
9 on the Board of Regents office was sufficient for the individuals. Plaintiff served ASU with  
10 the Notice of Claim based upon prior communications. Section 12-821.01 provides:

11 Persons who have claims against a public entity or a public employee shall file  
12 claims with the person or persons authorized to accept service for the public  
13 entity or public employee as set forth in the Arizona Rules of Civil Procedure  
within one hundred eighty days after the cause of action has accrues.

14 A.R.S. § 12-821.01(A). In turn, Rule 4.1(d) of the Arizona Rules of Civil Procedure requires  
15 service upon individuals personally, with another individual residing with the person or upon  
16 the person's appointed agent. Ariz. R. Civ. P. 4.1(d). Thus, to perfect his claims against the  
17 individual defendants, Plaintiff had to deliver notice of claim to the individual personally,  
18 an individual of suitable age and discretion residing with the individual, or the individual's  
19 appointed agent. However, the notice of claim statute is subject to estoppel and equitable  
20 tolling. *Jones v. Cochise County*, 187 P.2d 97, 104 (Ariz. Ct. App. 2008). Because both are  
21 equitable doctrines, the trial court acts as the factfinder and determines if they should apply.  
22 *McCloud v. State*, 170 P.3d 691, 695 (Ariz. Ct. App. 2007). Generally, when the facts are  
23 undisputed, the district court's decision regarding equitable estoppel is reviewed for an abuse  
24 of discretion. *Johnson v. Henderson*, 314 F.3d 409, 413-14 (9th Cir. 2002).

25 The doctrine of equitable estoppel is based on the principle that a party "should not  
26 be allowed to benefit from its own wrongdoing." *Collins v. Gee West Seattle LLC*, 631 F.3d  
27 1001, 1004 (9th Cir. 2011). The doctrine "focuses primarily on the actions taken by the  
28

1 defendant in preventing a plaintiff from filing suit." *Santa Maria v. Pacific Bell*, 202 F.3d  
2 1170, 1176 (9th Cir. 2000). In this Circuit, the plaintiff carries the burden of pleading and  
3 proving the following elements of equitable estoppel: (1) knowledge of the true facts by the  
4 party to be estopped; (2) intent to induce reliance or actions giving rise to a belief in that  
5 intent; (3) ignorance of the true facts by the relying party; and (4) detrimental reliance. *Bolt*  
6 *v. United States*, 944 F.2d 603, 609 (9th Cir. 1991). Additionally, when estoppel is sought  
7 against the government, "there must be affirmative misconduct (no mere negligence) and a  
8 serious injustice outweighing the damages to the public interest of estopping the  
9 government." *Id.* Equitable estoppel applies to bar a statute of limitations defense "when  
10 a plaintiff who knows of his cause of action reasonably relies on the defendant's statements  
11 or conduct in failing to bring suit." *Stitt v. Williams*, 919 F.2d 516, 522 (9th Cir. 1990).

12 In this case, the Arizona Board of Regents has prepared and issued a form, entitled  
13 "Notice of Claim Against Board of Regents," for a claimant's use to comply with Section  
14 12-821.01(A). The form represents that it encompasses all claims against, not only ASU or  
15 the Board of Regents, but any university employee under the Board of Regent's control. At  
16 its top, the form states the "claim must be filed in accordance with Section 12.821.01."  
17 However, at the bottom, the form direct the claimant to "file as follows: Arizona Board of  
18 Regents, 2020 N. Central Ave., #230, Phoenix, AZ 85004-4593, Attn: Board Secretary."  
19 To the immediate right, the form states: "University offices or officials cannot accept this  
20 form. Please direct it solely to the address shown to the left." The form contemplates that  
21 a single monetary amount of the claim be provided without division between individuals, and  
22 the form also contemplates a single factual statement "supporting the monetary claim." This,  
23 the claimant using the form would provide a factual background for his claims that includes  
24 all university individuals, apart from the Board of Regents and ASU. However, since the  
25 form directs filing of the form only with the Board of Regents at the address listed, and not  
26 any other university officials, a claimant would rely on this direction to file the form only  
27  
28

1 with the Board of Regents, and not any individuals included in the factual statement  
2 supporting the claims.

3 Here, Plaintiff used the Board of Regents form to file his claim against the Board of  
4 Regents, ASU, Sablan, Hicks and Seager. The factual statement asserts claims against  
5 Defendants Sablan, Hicks and Seager. Further, Plaintiff, as directed on the form, filed it at  
6 the address listed, and not any other university officials who "could not accept the form." In  
7 effect, the Board of Regents has issued the Notice of Claim form to trap claimants into  
8 providing their entire claim against the university officials on the form, but then limit service  
9 of the form to only the Board of Regents, knowing that failure to serve the individuals would  
10 bar those claims under Section 12-821.01. Therefore, the individual defendants are estopped  
11 from asserting the failure to serve defense against Plaintiff. Defendants rely on several cases  
12 that find the public employees must be personally served with the notice of claim. *See*  
13 *DeBinder v. Alberston's, Inc.*, No. CV 06-1804-PCT-PGR, 2008 WL 828789, at \*3 (D. Ariz.  
14 Mar. 26, 2008); *Harris v. Cochise Health Sys.*, 160 P.3d 223, 230 (Ariz. Ct. App. 2007);  
15 *Johnson v. Superior Court*, 763 P.2d 1382, 1384 (Ariz. Ct. App. 1988). However, none of  
16 these cases involved the service of ASU professors or the Board of Regents own Notice of  
17 Claim form which directs service with the Board of Regents.

18  
19  
20 **V. PLAINTIFF'S ALTERNATIVE REQUEST FOR LEAVE  
TO AMEND**

21 In the alternative to the above arguments, if the Court is inclined to grant Defendants'  
22 request, Plaintiff asks for leave to amend his Complaint to further set forth the factual basis  
23 of his claims with more particularity. Although courts have discretion to manage their  
24 dockets, there is a "strong presumption" in favor of allowing an amendment. *Fin.*  
25 *Acquisition Partners, L.P. v. Blackwell*, 440 F.3d 278, 291 (5th Cir. 2006). In the absence  
26 of some apparent or declared reason not to do so, leave to amend should be freely given,  
27 *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000), and refusal to do so can constitute an

1 abuse of discretion. *Schreiber Distrib. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th  
2 Cir. 1986). Accordingly, Plaintiff requests an opportunity to demonstrate to this Court that  
3 there are sufficient facts in this case to support his claims.

4  
5 **CONCLUSION**

6 For all of the above reasons, Plaintiff prays that the Defendants' Motion be DENIED.  
7 Strictly in the alternative, Plaintiff requests the Court grant leave for him to amend his  
8 Complaint in order to plead as ordered by this Court. Plaintiff prays for such other and  
9 further relief, general or special, in law or in equity, to which he may prove himself to be  
10 justly entitled.

11 Dated: April 1, 2016

JOSEPH P. PALMISANO

12  
13  
14 By: s/ Joseph P. Palmisano  
15 JOSEPH P. PALMISANO  
16 ACACIA LAW GROUP  
17 1839 S. Alma School Rd.  
18 Mesa, Arizona 85210  
19 Tel: 480.557.7800  
20 Attorney for Plaintiff Schwake

21 **CERTIFICATE OF SERVICE**

22 On the 1st day of April 2016, the undersigned hereby certifies that the foregoing  
23 Response was electronically filed with the Clerk of the Court using the ECF system and  
24 Counsel for Defendants will automatically receive notice of such filing in accordance with  
the Federal Rules of Civil Procedure.

25 s/ Joseph P. Palmisano  
26 JOSEPH P. PALMISANO  
27  
28